IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL MISC.APPLICATION No. 2473 of 2007

For Approval and Signature:

HONOURABLE MR.JUSTICE M.R. SHAH

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the Civil Judge?

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CHETANBHAI KAMALBHAI TOLANI - Applicant(s)
Versus
THE STATE OF GUJARAT & 1 - Respondent(s)

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Appearance :
MR BM MANGUKIYA for Applicant(s) : 1,
MR M.R.MENGDEY, ADDL. PUBLIC PROSECUTOR for Respondent(s) : 1,
MR MEHUL H RATHOD for Respondent(s) : 2,

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CORAM : HONOURABLE MR.JUSTICE M.R. SHAH

Date : 17/07/2007

ORAL JUDGMENT

1. By way of this application under Section 482 of the Criminal Procedure Code (for short “CrPC”), the petitioner – original accused No.2 – Contractor

has prayed for an appropriate order to quash and set aside the complaint being Inquiry Case No. 37 of 2007 pending in the Court of learned Chief Judicial Magistrate, Bhavnagar for the offences punishable under Sections 406, 409, 420, 465, 468, 471, 477(A), 120(B) and Section 114 of the Indian Penal Code (for short “IPC”) read with Sections 7,12, 13(c)(d) of the Prevention of Corruption Act, 1988 (for short “the P.C.Act, 1988”).

2. A criminal complaint being Inquiry Case No. 37 of 2007 is filed by the Executive Engineer of the Gujarat Water Supply and Sewerage Board (for short “the Board”) against the petitioner and other two co-accused for the offences punishable under Sections 406, 409, 420, 465, 468, 471, 477(A), 120(B) and Section 114 of the IPC read with Sections 7,12, 13(c) (d) of the the Act, 1988. It is alleged in the complaint that at the time of awarding the contract in favour of the petitioner, the petitioner – contractor had furnished Bank Guarantee of Rs. 15 lacs on 30.03.2005 and the original Bank Guarantee was kept in the custody of original accused No.1 at his Divisional Office. It is further alleged in the

complaint that though the work was not completed, original accused No.1 wrote a letter on 01.12.2005 to release Bank Guarantee; and that the original Bank Guarantee was not produced, the same was released, the payment was made and deposited in the account of the petitioner. Thus it is alleged that all the accused in connivance with each other have created false documents and used the said documents as if it was true documents. Therefore, it is alleged that the petitioner and other co-accused have committed aforesaid offences. That the learned Chief Judicial Magistrate, Bhavnagar passed an order dated 10.01.2007 directing the P.I. (A) Division, Bhavnagar to hold inquiry under Section 156(3) of the CrPC and submit the report. Being aggrieved and dissatisfied with the same, the petitioner has preferred the present application under Section 482 of the CrPC to quash aforesaid complaint.

3. Mr. Mangukiya, learned Advocate appearing on behalf of the petitioner has vehemently submitted that the petitioner has not committed any offences as alleged and the averments in the complaint do not constitute any cognizable offence. It is submitted

that in fact the work was carried and completed much earlier and therefore, the Bank Guarantee was rightly released in favour of the petitioner. It is submitted that at the most it can be said that there was irregularity on the part of the Officers of the Board. It is further submitted that it was certified that work has been carried out as per the specifications of the Board and final bills are prepared by the Board and the same is not being paid to the petitioner. It is submitted that as per the terms of contract, 50% of the Bank Guarantee was supposed to be released from the date of completion of work. The issuance of the completion certificate is a formality to certify that the work is completed. Therefore, it is submitted that the petitioner has not committed any offence as alleged. Shri Mangukiya, learned Advocate appearing on behalf of the petitioner has relied upon Page No. 24 of the compilation and has submitted that same is completion certificate and therefore, no illegality has been committed in releasing the Bank Guarantee in favour of the petitioner. Therefore, it is requested to exercise powers under Section 482 of the Criminal

Procedure Code to quash the complaint as continuous of said criminal proceedings and complaint would be abuse of process of law.

4. The present application is opposed by Shri Mehul Rathod, learned Advocate appearing on behalf of the Board and Shri M.R.Mengdey, learned Additional Public Prosecutor.

5. It is submitted that averments in the complaint discloses cognizable offence and the allegations in the complaint are of very serious nature. Looking to the averments and allegations in the complaint, it cannot be said that it does not require any further investigation. It is submitted that even the allegations are made against the Officers of the Board who have retired and against said Officers fifteen such complaints are filed. It is submitted that the allegations are not only for the offences punishable under IPC but also for the offences punishable under the Prevention of Corruption Act, 1988. Therefore, it is requested not to exercise the powers under Section 482 of the CrPC and not to stall the investigation at this stage.

6. Heard the learned Advocates appearing on behalf of the respective parties.

7. The allegations against the petitioner and other co-accused are for the offences punishable under the IPC as well as under the Prevention of Corruption Act, 1988. It is alleged in the complaint that though the work was not completed, there was no question of releasing Bank Guarantee by creating false documents and that original Bank Guarantee was in the custody of Divisional Office, all the accused in connivance with each other created false documents and used it as if it was true documents, the Bank Guarantee was released and the same was deposited in the account of the petitioner. It is to be noted that false letter / document dated 01.12.2005 was written to release Bank Guarantee and even as per the petitioner final bill was prepared in the month of May, 2006. Thus admittedly, when letter dated 01.12.2005 was created to release Bank Guarantee even final bill was not prepared. Unless and until the final bill was prepared, there was no question of releasing Bank Guarantee. It is also required to be noted that even for the purpose of releasing Bank

Guarantee, endorsement is to be made that Bank Guarantee be released. In the present case, original bank guarantee was lying in the custody of Divisional Office, false document was created and bank guarantee was released. Now looking to the averments in the complaint, it cannot be said that no case is made for further investigation and/or allegations/ averments in the complaint do not disclose any cognizable offence for which further investigation is not required.

8. As held by Hon'ble Supreme Court in the case of ***State of Oris.sa and Anr. V/s. Saroj Kumar Sahoo*** reported in *(2005) 13 SCC 540*, where investigation is incomplete it is impermissible for the High Court to look into materials, the acceptability of which is essentially a matter for trial. It is further held by the Hon'ble Supreme Court that exercise of power under Section 482 of CrPC is the exception and not the rule. It is further held that while exercising power under Section 482 of the CrPC, the High Court does not function as a Court of appeal or revision. Inherent jurisdiction under the section, though wide,has to be exercised sparingly, carefully and

with caution and only when such exercise is justified by the tests specifically laid down in the section itself. It is further held that inherent power should not be exercised to stifle a legitimate prosecution. The High Court being the highest court of a State should normally refrain from giving a *prima facie* decision in a case where the entire facts are incomplete and hazy, more so when the evidence has not been collected and produced before the Court and the issues involved, whether factual or legal, are of magnitude and cannot be seen in their true perspective without sufficient material. It is also further held by the Hon'ble Supreme Court that inherent power should be exercised sparingly and that too in the rarest of rare cases.

9. Now looking to the averments and allegations in the complaint, it cannot be said that it does not disclose any cognizable offence which does not require any further investigation. This is not a case where in exercise of power under Section 482 of CrPC, investigation is to be stalled at threshold. If the case is investigated, no prejudice will be caused to the petitioner – original accused. After the

investigation, the Investigating Officer would submit his report to the concerned learned trial Court and considering the same the learned trial Court would proceed further. Under the circumstances, it would not be proper at this stage to stall investigation at threshold. It is required to be noted and as stated above, the allegations against the petitioner and other co-accused are not only for the offences punishable under IPC but also under the P.C.Act, 1988 and normally, when the allegations are under the P.C.Act, 1988, the investigation is not required to be stalled. It is also required to be noted that allegations is against the Officers of the Board who have retired and against them such other fifteen complaints are filed. Under the circumstances, looking to the allegations and averments in the complaint, this Court is of firm opinion that no case is made out to stall investigation and quash the complaint at initial stage in exercise of powers under Section 482 of CrPC. This Court is not expressing further opinion on merits in detail as investigation is yet to take place and any observation may effect the investigation and/or

effect either parties. Suffice it to say that looking to the allegations and averments in the complaint, it requires further investigation.

10. For the reasons stated above, the application fails, requires to be dismissed and accordingly it is dismissed. Notice discharged. Ad-interim relief granted earlier stands vacated forthwith.

[M.R.Shah, J.]

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